Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

PHILIP I. WARREN,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the State of Wisconsin violate the Due Process Clause of the Fourteenth Amendment when it induced Petitioner's *Alford* plea by agreeing that he would be allowed to maintain his factual innocence, and then revoked Petitioner's probation because he wouldn't admit he was guilty?

2. Was the *Alford* plea – by which the defendant maintained his factual innocence of the charged offense – unknowingly and involuntarily entered, in violation of the Due Process Clause of the Fourteenth Amendment and *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Henderson v. Morgan*, 426 U.S. 637 (1976), because the defendant did not know, at the time of entry of his plea, that the State would not permit him to continue to maintain his innocence during the probationary term that the State was recommending pursuant to the plea agreement?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court in *State of Wisconsin ex rel. Philip I. Warren v. Schwarz*, No. 96-2441, and in *State of Wisconsin v. Philip Warren*, No. 97-0851, appears at Appendix A to the petition. The opinion has been designated for publication but has not yet been reported.

The opinion of the Wisconsin Court of Appeals in *State of Wisconsin ex rel. Philip I. Warren v. Schwarz*, No. 96-2441, appears at Appendix B to the petition and is reported at 211 Wis.2d 708, 566 N.W.2d 173 (Ct. App. 1997).

The order of the Wisconsin Supreme Court denying motion for reconsideration in *State of Wisconsin v. Philip Warren*, No. 97-0851 appears at Appendix C to the petition.

JURISDICTION

The date on which the highest state court decided this case was July 1, 1998. A copy of that decision appears at Appendix A. The date on which the Wisconsin Supreme Court denied the motion for reconsideration in *State of Wisconsin v. Philip Warren*, No. 97-0851 was August 27, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Philip I. Warren, by a joint petition, seeks review of the joint decision of the Wisconsin Supreme Court in *State of Wisconsin ex rel. Philip I. Warren v. Schwarz*, No. 96-2441 and in *State of Wisconsin v. Philip Warren*, No. 97-0851, issued on July 1, 1998.

On February 26, 1990, Mr. Warren was charged with two counts of sexual contact with J.L., the ten year old daughter of a woman that Mr. Warren had been living with during part of 1989 (AR 2).

On July 10, 1990, a plea hearing was held. Pursuant to a plea agreement, Mr. Warren entered an *Alford*[1] plea to count 2 of the information and the State agreed to dismiss count 1. In addition, as set forth by the district attorney:

> The parties have agreed that there will be a joint recommendation of no incarceration, no county jail time as a condition of probation or no state prison time. The State – the parties are free to argue the length of probation, and the State is free to argue for an imposed but stayed prison term.
>
> AR 65:2-3.

At the plea hearing, the court informed the defendant that, even though he was maintaining his innocence, he would have to enter into "good faith" counseling as part of the term of probation. The court stated:

> I realize that you, by making your plea of no contest, are not admitting anything in court, but you still would have an obligation to enter into counseling in good faith with the counselor, the psychiatrist, or doctor, whoever, so that's something that you should realize.
>
> AR 65:8.

The court did not inform the defendant that "good faith" participation in counseling would mean admitting the guilt that he had specifically denied as part of the *Alford* plea agreement.

After being placed on probation, the defendant was under probation supervision for a period of approximately five years. During this time, he participated in a

---

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

treatment program on three separate occasions, in 1991, 1992, and 1995. While the defendant attended every session for every program, he continued to maintain his innocence of the alleged offenses. On September 26, 1995, after the conclusion of the third program, the defendant's probation agent, in consultation with her supervisor, decided to revoke the defendant's probation because he had not "made any progress toward coming out of denial or taking responsibility for his offense." The defendant was viewed as failing to successfully complete the group because he continued to deny culpability for the alleged offenses (AR 32:15). On December 11, 1995, Mr. Warren's probation was revoked based solely on his refusal to admit guilt and he began serving the five year sentence imposed in 1990 (AR 32:17).

On January 25, 1996, petitioner sought review of the revocation decision by petition for writ of certiorari in Richland County Circuit Court, Case No. 96-CV-8. Petitioner alleged a violation of his Fourteenth Amendment due process rights when the State accepted petitioner's *Alford* plea, allowing him to assert his innocence of the charged offense, and then revoked his probation solely because he continued to maintain innocence during the probation term. On July 25, 1996, the trial court denied the petition for writ of certiorari (AR 32:24-26). Although the trial court found that the sole reason for probation revocation was petitioner's failure to admit guilt for the offense for which he was convicted, and that he had no other probation violations (AR 32:25), the court concluded that petitioner's due process rights were not violated by the probation revocation based solely on the petitioner's continued assertion of innocence (AR 32:26).

On May 17, 1997, the Wisconsin Court of Appeals affirmed the trial court's decision in *State ex rel. Warren v. Schwarz*, 211 Wis.2d 708, 566 N.W.2d 173 (Ct. App. 1997). The court of appeals concluded that Mr. Warren's right to due process was not violated by requiring him to admit responsibility for the sexual assault during the service of his probation term because "there is nothing inherent in the nature of an *Alford* plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction" (Appendix B8-9).

In a separate action initiated in October 1996, after the trial court's denial of his petition for writ of certiorari, petitioner sought review of the validity of his *Alford* plea by state postconviction proceedings under Wis. Stat. sec. 974.06. Petitioner alleged that the plea was not knowing and voluntary, that the State's effort to imprison him for refusing to admit guilt while on probation constituted a breach of the plea agreement, and that the trial court should not have accepted the *Alford* plea because no strong proof of guilt was offered.

At the postconviction hearing on October 30, 1996, Mr. Warren's trial counsel testified that "the primary motivating factor in the plea agreement that Mr. Warren and I discussed was the understanding that Mr. Warren would receive probation; that he would not have to spend time in jail" (AR 67:7). Trial counsel further testified that Mr. Warren asserted his innocence throughout the representation; that Mr. Warren was willing to enter into a plea agreement if "his innocence could be preserved from his viewpoint"; that the possibility that Mr. Warren might have to admit guilt in order to successfully complete the

probation term never occurred to him [trial counsel] and that he never discussed such a possibility with his client (AR 67:7-8).

Under cross-examination, trial counsel testified that he explained to Mr. Warren that, under an *Alford* plea, "you can *continue* to assert your innocence in connection with the crimes for which you've been charged" (AR 67:12) (emphasis added). Trial counsel stated it was Mr. Warren's understanding "that he could continue to assert his innocence" (AR 67:13); that he did not discuss with Mr. Warren the possibility that he might have to admit guilt during counseling while on probation (AR 67:14); that trial counsel had confidence that, under the plea bargain, Mr. Warren would not be required later on to either admit guilt or go to jail (AR 67:19); and that trial counsel and the defendant were misled if the district attorney's office understood that they could revoke probation because Mr. Warren failed to admit guilt (AR 67:23).

Mr. Warren testified that he was never advised by counsel that he might have to admit guilt in order to successfully complete the probation term (AR 67:27) and that he would not have entered the plea agreement if he had known that he would not be allowed to maintain his innocence (AR 67:29). Mr. Warren also testified that if the court had told him, at the plea hearing, that "good faith" participation in counseling meant that he would have to admit guilt, he would not have entered the plea agreement (AR 67:39). Mr. Warren stated that he cooperated with and attended all counseling sessions and told the truth at those sessions, and that this was his understanding of what participation in "good faith" required (AR 67:41).

Mr. Warren's step-father, Talbot Hayes, also testified at the postconviction hearing. Mr. Hayes hired trial counsel to represent Mr. Warren in this case, and was present at every discussion between Warren and trial counsel (AR 67:46). Mr. Hayes testified that a substantial sum was paid to counsel; that it would have been necessary to pay considerably more money if the case went to trial; and that this financial consideration was an important factor in the decision to not go to trial (AR 67:46). Mr. Hayes also testified that he was not informed that Mr. Warren might have to admit guilt in order to successfully complete probation, and that if that had come up, they would have gone to trial (AR 67:47).

Mr. Hayes stated that they ultimately decided on the *Alford* plea for three reasons:

> You can maintain your innocence and it was a probationary sentence and we didn't have to pay the extra cost of going to court and everything. Just seemed like a way out at the time.
>
> AR 67:47.

Mr. Hayes testified that if the option had only been a guilty plea – rather than *Alford* – with probation, "we would have gone to trial" (AR 67:47).

The trial court concluded that the *Alford* plea was knowing and voluntary. The court concluded that the court had no obligation to ensure that the defendant was aware, at the time of the plea, that he might not be able to maintain innocence in order to successfully complete the probationary term. The court stated:

> The court did not tell Mr. Warren specifically that if he didn't admit guilt, he would fail his

> counseling and be revoked. Quite frankly, the Court didn't tell him that because the Court didn't necessarily know that, but in any event, I think I warned him that he would have to go through counseling.
>
> AR 68:27.

On November 26, 1997, the Wisconsin Court of Appeals certified the appeal of the order denying relief to the Wisconsin Supreme Court, noting that the case was closely related to the appeal in *State of Wisconsin ex rel. Philip I. Warren v. Schwarz*, for which review had been granted.

On July 1, 1998, the Wisconsin Supreme Court issued a joint decision, affirming the decision of the court of appeals in *State of Wisconsin ex rel. Philip I. Warren v. Schwarz* and affirming the order denying postconviction relief in *State of Wisconsin v. Philip Warren* (Appendix A). With regard to the question of whether an *Alford* plea involves any implicit assurances to a defendant that he can maintain innocence after conviction, the Wisconsin Supreme Court agreed with the court of appeals that "nothing inherent in the nature of an *Alford* plea. . . . gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction" (Appendix A15). With regard to whether the failure to notify the defendant at the time of the plea that he would not be able to maintain innocence after conviction, the court invoked the distinction between "direct" and "collateral" consequences of a plea. The court concluded that "the circuit court was not required to inform Warren that his probation could be revoked for failing to take

responsibility for his actions because it was only a collateral consequence of his conviction" (Appendix A20).

REASONS FOR GRANTING THE PETITION

The basic issue is the character, under the Due Process Clause, of an *Alford* plea. The Wisconsin Supreme Court concluded that a State *can* "be allowed to act inconsistently with the bargains which it makes to induce a guilty plea in a criminal case" (Appendix A12). It did so on the theory that an *Alford*-pleading defendant is identically situated to a defendant convicted after trial.

But this analogy is specious: a defendant convicted at trial exercised all of his rights. The *Alford* plea is a waiver of those rights expressly hinged on being allowed to maintain innocence. To then force the *Alford*-plea defendant to admit guilt as a direct consequence of that conviction is to make the *Alford* plea into an official judicial fraud. The promise which the State made to secure the defendant's plea, and accompanying waiver of rights, is kept only until the defendant walks out the courtroom doors.

This Court should grant review in this case to resolve the significant conflict between the States regarding whether a defendant entering an *Alford* plea must be notified, at or before the plea hearing, that he will not necessarily be permitted to maintain innocence outside of the plea hearing context, and that if placed on probation, he could be revoked and imprisoned for failing to admit guilt for the offense.

This Court has established the bedrock due process principle that a guilty plea, involving the waiver of fundamental constitutional rights, must be knowingly and voluntarily entered. *Henderson v. Morgan*, 426 U.S. 637 (1976); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). Although the defendant's admission of guilt in open court is normally "[c]entral to the plea and the foundation for entering judgment against the defendant" *Brady v. United States*, 397 U.S. 742, 748 (1970), this Court has concluded that a guilty plea may be knowing and voluntary even when the defendant maintains innocence of the charge at the time of plea. *North Carolina v. Alford*, 400 U.S. 25 (1970). In *Alford*, a case involving a first degree murder charge and the possible imposition of the death penalty, the Court concluded that the defendant's guilty plea to second degree murder, even though accompanied by protestations of innocence, was knowingly and intelligently entered and was properly accepted by the trial court because strong evidence of actual guilt was presented at the plea hearing. *Alford*, 400 U.S. at 37-38.

A problem frequently arises when *Alford* pleas are utilized in sexual assault cases. In many sexual assault cases, defendants are required to participate in rehabilitative treatment as a condition of probation imposed after conviction. Because a defendant's admission of guilt is often viewed as a critical first step in successful sex offender treatment, a defendant who refuses to admit guilt during sex offender treatment while on probation may face termination from the program and revocation of probation. When a defendant enters an *Alford* plea to a sexual assault charge, and has a reasonable expectation of being placed on probation pursuant to a plea agreement,

can that plea be viewed as knowing and voluntary if the defendant is not notified prior to entry of the plea, that he will be imprisoned if he continues to maintain innocence while on probation?

The Supreme Courts of both Wisconsin and Colorado have concluded this year that a defendant does not need to be notified, at the time of entry of an *Alford* plea to a sex offense, that he will not be able to continue to maintain innocence of the offense during the service of the probation term imposed upon conviction. *State ex rel. Warren v. Schwarz*, *supra*, and *People v. Birdsong*, 1998 WL 251473 (Colo. S. Ct. 1998) (No. 96SC828, decided May 18, 1998). In each of these decisions, the court relied on the distinction between the "direct" and "collateral" consequences of conviction in concluding that imprisonment for failure to admit guilt after being convicted upon an *Alford* plea is only a "collateral" consequence of conviction. This discussion of direct and collateral consequences of a guilty plea shifts the focus away from what is really at issue: is an *Alford* plea meaningful or merely a judicial ruse by which a guilty plea can be obtained through a meaningless promise that a criminal defendant will be allowed to maintain factual innocence? It also shifts focus away from the core issues of the voluntariness of the plea: did the petitioner know that his *Alford* plea would allow the State later to force him to either admit factual guilt or face prison.

In Mr. Warren's case, the State did not contest that petitioner was advised by his attorney that he could continue to maintain innocence by means of the *Alford* plea. Nor did the State contest that petitioner entered the *Alford* plea only because it allowed him to continue to

maintain innocence and guaranteed, by means of the plea bargain, that he would not be sentenced to jail or prison. The State also did not contest that petitioner would not have entered the *Alford* plea if he had known that he would not be allowed to continue to maintain innocence. If Mr. Warren did not know that the *Alford* plea did not afford him the ability to continue to maintain his innocence, and if that ability to maintain innocence was absolutely central to the decision to plead, the plea cannot be a knowing and voluntary plea.

The Wisconsin and Colorado decisions are in conflict with decisions from four other states. *State v. Jones*, 926 P.2d 1318 (Idaho App. 1996); *People v. Walters*, 627 N.Y.S.2d 289 (Co.Ct. 1995); *Diaz v. State*, 629 So.2d 261, 262 (Fla.App. 4 Dist. 1993); and *Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991). In each of these four cases the defendant entered an *Alford*-type plea to a sexual assault charge, was placed on probation, and subsequently faced revocation of probation for failing to admit guilt as part of a treatment program. The decision in each of these cases turned on whether or not the defendant had been notified, at the time of entry of the plea, that he would not be permitted to continue to maintain innocence after the plea hearing. In *Jones*, the defendant had been so notified and the *Alford* plea and revocation of probation were upheld. In *Walters*, *Diaz*, and *Gilfillen*, the defendant had not been so notified at the time of the plea, and the probation revocation decision was reversed.

The Court should grant the petition in this case to resolve this conflict among the States regarding the information that must be provided, at the time of the plea, to a defendant who maintains innocence while pleading no

contest or guilty to the charge. The Court should establish that when a defendant's core concern in the plea process is to maintain innocence, the defendant must be notified at the time of the plea if he will be unable to maintain innocence after conviction. The failure to provide such notice renders the plea involuntary and unknowing, under *Boykin* and *Henderson, supra.*

Mr. Warren entered a specialized plea, allowing him to "maintain innocence". The trial court did not know that Mr. Warren could be revoked and go to prison if he continued to maintain his innocence while on probation. Mr. Warren's attorney did not know that Mr. Warren could be imprisoned solely for continuing to maintain his innocence. Mr. Warren entered the plea only because he thought it allowed him to continue to maintain innocence, and because under the plea agreement, he would not have to serve any jail or prison time as a result of conviction. In such circumstances, where the defendant misunderstands the core elements of the plea, the plea cannot be viewed as knowing and voluntary under this *Boykin* and *Henderson, supra.*

CONCLUSION

For the reasons set forth, Mr. Warren requests that the petition for a writ of certiorari be granted.

Respectfully submitted this 29th day of September, 1998.

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APPENDIX A

IN SUPREME COURT

Nos. 96-2441, 97-0851

STATE OF WISCONSIN

State of Wisconsin ex rel.
Philip I. Warren,

Petitioner-Appellant-
Petitioner,

v.

David H. Schwartz, in his capacity as Administrator, Department of Administration, Division of Hearings and Appeals,

Respondent-Respondent.

(FILED

JUL 1, 1998)

State of Wisconsin,

Plaintiff-Respondent,

v.

Philip Warren,

Defendant-Appellant.

REVIEW of a decision of the Court of Appeals. *Affirmed.* APPEAL from an order of the Circuit Court for Richland County, Kent C. Houck, Judge. *Affirmed.*

¶1 JON P. WILCOX, J. These cases have arrived at the court's threshold from divergent paths. Case No. 96-2441 is a review of a published decision of the court of appeals, *State ex rel. Warren v. Schwarz*, 211 Wis. 2d 708,

566 N.W.2d 173 (Ct. App. 1997), which affirmed an order of the circuit court for Richland County, Kent C. Houck, Judge. The circuit court affirmed a decision of the Department of Administration, Division of Hearings and Appeals (Department), revoking the defendant Philip Warren's (Warren) probation.

¶2 Our review of the court of appeals' decision presents only one issue: was Warren's right to due process violated when the State of Wisconsin (State), following Warren's entry of an *Alford* plea, later revoked his probation for failing to successfully complete a sex offender treatment program which required him to admit his guilt? We hold that Warren's right to due process was not violated by the revocation of his probation and, accordingly, we affirm the decision of the court of appeals.

¶3 Case No. 97-0851 is before the court on certification from the court of appeals following an order of the circuit court for Richland County, Kent C. Houck, Judge. In this case, the circuit court denied Warren's motions for post-conviction relief and for appointment of counsel. On certification, we consider the following issues: (1) Did the circuit court's failure to inform Warren at the time of his *Alford* plea that he would be required to admit his guilt during a sex offender treatment program render that plea unknowing and involuntary in violation of his right to due process; (2) did the State violate the terms of the *Alford* plea agreement when it revoked Warren's probation for failing to admit his guilt; (3) did the circuit court properly conclude that the evidence against Warren provided "strong proof of guilt" justifying acceptance of an *Alford* plea; and (4) was the circuit required as a matter of

due process to appoint counsel to represent Warren at the post-conviction proceedings in this case?

¶4 We hold first that the circuit court's failure to inform Warren at the time of his *Alford* plea that he would have to admit his guilt during a probationary sex offender treatment program did not render his *Alford* plea unknowing or involuntary. Second, we hold that the State did not violate the terms of the *Alford* plea agreement when it revoked Warren's probation for failing to admit his guilt. Third, we hold that the circuit court properly concluded that the evidence before it established "strong proof of guilt" so as to justify acceptance of Warren's *Alford* plea. Finally, we hold that the circuit court was not required as a matter of due process to appoint counsel to represent Warren at the post-conviction proceedings in this case. Accordingly, we affirm the order of the circuit court.

¶5 The facts relevant to our disposition of both cases, though lengthy, are not in dispute. On February 26, 1990, Warren was charged with two counts of sexual assault of a child, J.K., the ten year old daughter of a woman with whom Warren had lived in 1989. On March 20, 1990, the circuit court held a preliminary hearing at which J.K. testified. J.K. began her testimony by indicating that on more than one occasion, Warren had "touch[ed] me in the wrong places." She then proceeded to describe the events of a particular incident which occurred sometime after May 22, 1989, in more detail:[1]

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[1] These portions of the preliminary hearing testimony appear in Record on Appeal, No. 97-0851 at 63 (Prelim. Hrg. March 20, 1990).

Q: Okay. Can you tell us what happened that day – how the whole thing started out?

A: Well, I was watching t.v. and he told me to come over on the couch.

Q: Okay. And after he told you to come over to the couch, what happened?

A: He started touching me.

Q: And where did he touch you?

A: On my breasts and on my crotch.

Q: How long did this touching go on?

A: Fifteen to twenty minutes.

. . .

Q: When you say that Phil gives you bad touches, what do you mean?

A: Like rubbing.

Q: And where does he do it? Where does he rub you?

A: My crotch.

¶6 Later, J.K. proceeded to describe the particulars of a separate and discrete incident:

Q: Okay. Now what was the second time?

. . .

A: He was in the bedroom.

Q: Okay. And what happened that time?

A: He told me to come in there.

Q: Okay. And after he told you to come in, what happened?

A: He told me to lay down on the bed.

Q: Okay. And after he told you to lay down on the bed, what happened?

A: He started touching me.

Q: And where did he touch you?

A: My breasts and my crotch.

When asked upon cross-examination whether she would "describe this touching by Phil more like tickling," J.K. responded, "No."

¶7 The circuit court also received testimony from Officer Virginia Cupp (Cupp), who related to the court statements made by J.K. at an interview conducted in February of 1990.[2] According to Cupp, J.K. told her that Warren "unzipped, unbuttoned and upzipped her pants and put his hands – and as I remember she describes more like two or three fingers – in her crotch area underneath her underpants."

¶8 Following the preliminary hearing, a plea hearing was held on July 10, 1990. At the hearing, Warren entered an *Alford* plea to one of the sexual assault counts, and the State agreed to dismiss the remaining count. Before accepting the plea, the circuit court informed Warren of the important rights he was waiving, questioned defense counsel on the voluntariness of Warren's plea, and cautioned the defendant that his probation would be

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[2] The hearsay implications of Officer Cupp's testimony were resolved in the circuit court, and are not a subject before us on review.

revoked if he failed to complete the terms of his probation. The following exchange then occurred:

> THE COURT: . . .
>
> One other thing that I should perhaps address. In the event that the Court grants probation, probable [sic] or very likely one item that is going to be ordered is counseling, and you will be expected to enter into good faith counseling as part of the term of probation, and that carries with it – I realize that you, by making your plea of no contest, are not admitting anything in court, but you still would have an obligation to enter into counseling in good faith with the counselor, the psychiatrist, or doctor, whoever, so that's something that you should realize. Now, given all of the things that I told you about the effect of your plea, do you have any questions about it?
>
> THE DEFENDANT: No, your Honor.

Record on Appeal, No. 96-2441 at 8:68 (Plea Hrg. July 10, 1990).

¶9 Following this colloquy with the defendant, the circuit court concluded that the testimony at the preliminary hearing on March 20, 1990, was sufficient to constitute strong proof of guilt as required by an *Alford* plea. Accordingly, the circuit court accepted the plea and entered a judgment of conviction against Warren for sexual assault of a child.

¶10 On November 5, 1990, the circuit court imposed a five-year prison sentence, which it stayed in favor of an eight-year term of probation. As a condition of that probation, the circuit court ordered that Warren obey the

rules of the probation department and "that he attend any and all counseling that is ordered by the Department [of Corrections] including an alcohol and drug assessment, psychological or psychiatric assessment; and that he follow all the recommendations that any study or any counselor comes up with." Record on Appeal, No. 97-0851 at 66:17 (Sentencing Hrg. Nov. 5, 1990).

¶11 After being sentenced, Warren served under probationary supervision for approximately five years. During this time, he participated in the Attic Correctional Services' Denial Focus Sex Offender Group on three separate occasions in 1991, 1992 and 1995.[3] Although Warren attended every session and participated in the group discussions, he consistently and repeatedly denied any culpability in his conviction for sexual assault of a child.[4]

¶12 In apparent response to his unwillingness to take responsibility for his actions, Warren's probation rules were amended on April 3, 1995, to include Rule 15F, which stated: "You shall enter and successfully complete sex offender treatment groups at an approved outpatient treatment program, attend weekly, and abide by the rules

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[3] The program director for Attic's Madison office testified that the main goal of the group is to "break denial." Record on Appeal, No. 96-2441 at 17:6 (Prob. Revocation Hrg. Nov. 10, 1995). The requirement that Warren complete the Attic group first appeared as a rule of probation on March 27, 1991.

[4] One counselor noted that he "continues to portray himself as the victim of an over-zealous judicial system that trumped up molestation charges against him. . . . " Record on Appeal, No. 96-2441 at 8:10 (Attic Correctional Servs. Mem. Sept. 27, 1995).

of the contract. . . . " Record on Appeal, No. 96-2441 at 8:35 (Amended Probation/Parole Rules April 3, 1995).

¶13 On December 11, 1995, the Department revoked Warren's probation for failure to admit his guilt during counseling, and ordered Warren to begin serving the five year sentence imposed in 1990.[5] The following month, Warren sought review of the Department's revocation decision by petition for writ of certiorari in the Richland County Circuit Court pursuant to Wis. Stat. § 781.01 (1993-94). Raising substantially the same arguments which he presents to this court, Warren sought to be placed back on probation. Finding "no merit in [Warren's] contention that he has a special right to maintain his denial during treatment because he was allowed to enter an *Alford* plea," the circuit court affirmed the Department's decision to revoke Warren's probation. Record on Appeal, No. 96-2441 at 12:2 (Mem. Decision July 25, 1996).

¶14 Upon review of Warren's subsequent appeal, the court of appeals affirmed. The court reasoned that entry of an *Alford* plea does not imply an assurance that the defendant will not have to admit his guilt during the conviction or punishment phases of his prosecution. *See Warren*, 211 Wis. 2d at 718. The court also rejected Warren's argument that the Department failed to explore the

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[5] Specifically, the Department listed one reason for revoking Warren's probation: "On or about 08/31/95, Philip I. Warren failed to successfully complete the Attic's Denial Focus Sex Offender Group in violation of rule #15f of the Rules of Probation and Parole signed on 04/03/95." Record on Appeal, No. 96-2441 at 8:90 (Admin. Decision Nov. 17, 1995).

alternatives it had to revocation of his probation. *See id.* at 727. We granted Warren's petition for review on October 14, 1997, and now affirm. Additional facts which are relevant to our disposition of Case No. 97-0851 are set forth below.

¶15 On October 9, 1996, Warren filed a post-conviction motion pursuant to Wis. Stat. § 974.06 (1995-96),[6] and a motion for appointment of counsel. At the post-conviction hearing on October 30, 1996, Warren testified that he would not have entered an *Alford* plea if he had known that he would have to admit his guilt during probationary counseling. He therefore sought to withdraw his plea.

¶16 The circuit court subsequently denied Warren's motion to withdraw his plea on grounds that the plea colloquy was sufficient to inform the defendant of the required counseling. Second, the court determined that there was no breach of a plea agreement since the court had informed Warren of the consequences of violating his terms of probation. Third, the circuit court reassessed the strength of the preliminary hearing evidence and determined that the preliminary hearing provided sufficient basis for the court's finding of strong proof of guilt. Finally, the court denied Warren's motion for appointment of counsel. Warren appealed from the circuit court's final order.

¶17 The court of appeals certified the case to this court pursuant to Wis. Stat. § (Rule) 809.61. On December 16, 1997, we granted the court of appeals' request for

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[6] All future statutory references are to the 1995-96 volume unless otherwise noted.

certification, and consolidated the cases for our review. We now affirm.

DUE PROCESS CHALLENGE

¶18 The first issue we consider is whether Warren's right to due process[7] was violated when the State, following Warren's entry of an *Alford* plea, later revoked his probation for failing to successfully complete a sex offender treatment program which required him to admit his guilt. Appellate review of a probation revocation by the Department is limited to four inquiries: (1) whether the Department acted within the bounds of its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will, not its judgment; and (4) whether the evidence was sufficient that the Department might reasonably make the determination that it did. *See Van Ermen v. State*, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978); *Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994).

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[7] The Fourteenth Amendment to the United States Constitution provides "nor shall any State deprive any person of life, liberty, or property, without due process of law." This court has interpreted Wis. Const. art. I, § 1, of the Wisconsin Constitution to be the "functional equivalent" of the federal provision. *See, e.g., Reginald D. v. State*, 193 Wis. 2d 299, 306-307, 533 N.W.2d 181 (1995) (citations omitted). Article I, § 1 of the Wisconsin Constitution provides: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1.

¶19 Today's decision requires an examination of the second inquiry: whether the Department acted according to law. Because Warren alleges that the Department's enforcement of a particular condition of probation violated his constitutional right to due process, we are presented with a question of law which we review de novo, without deference to the conclusions of the circuit court or the court of appeals. *See State v. Carrizales*, 191 Wis. 2d 85, 92, 528 N.W.2d 29 (Ct. App. 1995); *State v. Miller*, 175 Wis. 2d 204, 208, 499 N.W.2d 215 (Ct. App. 1993).

¶20 Warren's due process argument requires this court to tangle with the fundamental principle upon which all *Alford* pleas turn: that an accused may plead guilty, while simultaneously protesting his or her innocence. The plea finds its roots in *North Carolina v. Alford*, 400 U.S. 25 (1970), where the defendant affirmatively protested his innocence, yet pled guilty to second-degree murder in order to avoid the death penalty he may have otherwise received. *See id.* at 26-29. The Supreme Court upheld the trial court's acceptance of such a plea, and stated:

> while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Id. at 37.

¶21 The *Alford* plea, though not uncontroversial,[8] has been accepted in Wisconsin. *See State v. Garcia*, 192 Wis. 2d 845, 532 N.W.2d 111 (1995); *State v. Johnson*, 105 Wis. 2d 657, 314 N.W.2d 897 (Ct. App. 1981). *See also State v. Smith*, 202 Wis. 2d 21, 549 N.W.2d 232 (1996). Warren argues that acceptance of an *Alford* plea necessarily contemplates that defendants will be allowed to maintain their factual innocence, even while completing the terms of probation which have been imposed upon them. In Warren's terms, "the State cannot be allowed to act inconsistently with the bargains which it makes to induce a guilty plea in a criminal case." Warren Brief, No. 96-2441 at 17. We disagree.

¶22 Before addressing these arguments, however, we first clarify the practical effect, and legal consequence, of an *Alford* plea. An *Alford* plea is a guilty plea in the

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[8] *See, e.g., State v. Garcia*, 192 Wis. 2d 845, 869, 532 N.W.2d 111 (1995) (Wilcox, J., concurring) (recommending "that the trial courts in this state act with great reticence when confronted with an *Alford* plea."); Fed. R. Crim. P. 11 advisory committee note, "1974 Amendment" ("The defendant who asserts his innocence while pleading guilty or nolo contendere is often difficult to deal with in a correctional setting, and it may therefore be preferable to resolve the issue of guilt or innocence at the trial stage rather than leaving that issue unresolved, thus complicating subsequent correctional decisions."). *Cf.* Curtis J. Shipley, Note, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 Iowa L. Rev. 1063, 1089 (1987) (concluding that "[t]he Alford plea is a necessary option for the criminal defendant within the context of the plea bargaining system."). For a discussion of the pros and cons of accepting *Alford* pleas, see generally 2 David Rossman, *Criminal Law Advocacy* ¶ 9 (1995).

same way that a plea of *nolo contendere* or no contest is a guilty plea.[9] *Alford* itself makes this clear:

> The fact that [Alford's] plea was denominated a plea of guilty rather than a plea of *nolo contendere* is of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences, not the formal categorizations, of state law.
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> . . . [W]e [do not] perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.

Alford, 400 U.S. at 37.

¶23 We have frequently held that a plea of no contest places the defendant in the same position as though he had been found guilty by the verdict of a jury. *See, e.g., State v. Rachwal*, 159 Wis. 2d 494, 503-504 n.6, 465 N.W.2d 490 (1991); *Ellsworth v. State*, 258 Wis. 636, 638-39, 46 N.W.2d 746 (1951); *Brozosky v. State*, 197 Wis. 446, 450, 222 N.W. 311 (1928). The same is true for an *Alford* plea – a view supported by the Wisconsin Jury Instructions. *See*

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[9] The key distinction between the two pleas is that "[a]n *Alford* plea goes beyond a no contest plea in the sense that the former involves an outright claim of innocence while the latter involves something less than an express admission of guilt." Wis JI – Criminal SM-32A at 1 (1995).

Wis JI – Criminal SM-32A at 10 (1995) ("There is no doubt that an *Alford* plea supports a fully effective criminal judgment. This is especially clear since a true *Alford* plea is a plea of guilty.").

¶24 These considerations lead us to conclude that when the State required Warren to admit to the sexual assault in this case,[10] it did not act inconsistently with the "bargain" it had made to "induce" his guilty plea. A defendant's protestations of innocence under an *Alford* plea extend only to the plea itself.

¶25 A defendant may choose to enter an *Alford* plea for various reasons. He may wish to take advantage of the state's offer for a reduced sentence. He may wish to

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[10] It is a central tenet of sex offender treatment to require the offender to admit his or her guilt. *See, e.g., State v. Carrizales*, 191 Wis. 2d 85, 95, 528 N.W.2d 29 (Ct. App. 1995) ("[C]ounselors view this admission as a first step toward rehabilitation" since "untreated sex offenders pose a risk in the community" and a defendant's "refusal to admit guilt makes it difficult for his probation officer to ensure the safety of the community."); Barbara E. Smith, et al., *The Probation Response to Child Sexual Abuse Offenders: How is it Working?* at 8 (ABA Study January 1990) ("With few exceptions, the therapists interviewed said they would not accept anyone in their program who absolutely denied sexual conduct with children."); Kim English, et al., *Managing Adult Sex Offenders in the Community – A Containment Approach* at 5 (Nat'l Inst. Justice January 1997) ("In pursuing safe and effective treatment of sex offenders in the community, therapists must obtain full disclosure of offenders' sexual histories."). This requirement, like any other condition of probation, serves the goals of rehabilitation and protection of the state and community interest. *See Carrizales*, 191 Wis. 2d at 93.

spare himself or his family of the expense and embarrassment of a trial. Whatever the reason for entering an *Alford* plea, the fact remains that when a defendant enters such a plea, he becomes a convicted sex offender and is treated no differently than he would be had he gone to trial and been convicted by a jury.

¶26 On this point, we agree with the conclusions of both the circuit court and the court of appeals. The circuit court stated:

> [t]here are no grades of conviction in the criminal law of Wisconsin. If a person is convicted, after an *Alford* plea is accepted, they stand convicted in the same manner as a person who has had a full jury trial. All convicted persons are subject to the same rules laid down by the Department of Corrections if they are placed on probation or in an institution.

Record on Appeal, No. 96-2441 at 12:2 (Mem. Decision July 25, 1996).

¶27 The court of appeals reached the same conclusion by stating: "An *Alford* plea does not imply a promise or assurance of anything. . . . There is nothing inherent in the nature of an *Alford* plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction." *Warren*, 211 Wis. 2d at 718.

¶28 These conclusions are well-founded. Put simply, an *Alford* plea is not the saving grace for defendants who wish to maintain their complete innocence. Rather, it is a device that defendants may call upon to avoid the expense, stress and embarrassment of trial and to limit

one's exposure to punishment. *See Alford*, 400 U.S. at 37; *Garcia*, 192 Wis. 2d at 856-57.

¶29 Warren argues that fundamental fairness principles of due process dictate that defendants who enter an *Alford* plea must have notice at the time the plea is entered that they will be required to admit to their offense in order to satisfy the terms of their probation. Warren did not raise this "notice" argument before the court of appeals in Case No. 96-2441. *See generally Warren*, 211 Wis. 2d 708. Although we retain the discretion to do so, this court generally does not consider issues raised for the first time on appeal. *See Flynn v. Dep't of Admin.*, 216 Wis. 2d 520, 554, 576 N.W.2d 245 (1998) (citations omitted). In this instance, we decline to address Warren's "notice" argument and its corresponding use of case law in Case No. 96-2441.[11]

¶30 In sum, we hold that the revocation of Warren's probation for failure to admit his guilt after acceptance of his *Alford* plea did not violate his right to due process. Accordingly, the decision of the court of appeals in Case No. 96-2441 is affirmed.[12]

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[11] We note that when asked at oral argument about the difference between his due process "notice" argument and his knowing and voluntary plea (due process) argument in Case No. 97-0851, counsel for Warren conceded: "I think those arguments are basically the same argument."

[12] In two paragraphs of his reply brief, Warren asserts, as he did before the court of appeals, that the Department failed to explore all of its available alternatives to revocation before revoking Warren's probation in this case. *See* Warren Reply Brief, No. 96-2441 at 11-12. Because Warren does not raise this argument as a separate issue for our review, and because the

KNOWING AND VOLUNTARY ENTRY OF PLEA

¶31 We next consider whether the circuit court's failure to inform Warren at the time of his *Alford* plea that he would be required to admit his guilt during a sex offender treatment program rendered that plea unknowing and involuntary in violation of his right to due process. As a remedy for this claim, Warren seeks to withdraw his plea.

¶32 Permitting withdrawal of a guilty or no contest plea is a matter left to the circuit court's discretion. Therefore the circuit court's decision to deny Warren's motion to withdraw his *Alford* plea will be upset only if the circuit court has erroneously exercised its discretion. *See State v. Johnson*, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997); *State v. Bangert*, 131 Wis. 2d 246, 288-89, 389 N.W.2d 12 (1986); *State v. Spears*, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). In order to sustain this discretionary decision, we must ensure that the circuit court's determination was made upon the facts of record and in reliance on the appropriate and applicable law. *Bangert*, 131 Wis. 2d at 289.

¶33 After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries a heavy burden. The defendant must establish by clear and convincing evidence that the circuit court should permit the defendant to withdraw the plea to correct a "manifest

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court of appeals adequately addressed this assertion, we find it unnecessary to comment further on this issue. *See State ex rel. Warren v. Schwarz*, 211 Wis. 2d 708, 721-28, 566 N.W.2d 173 (Ct. App. 1997).

injustice." *See State v. Reppin*, 35 Wis. 2d 377, 385-86, 151 N.W.2d 9 (1967); *State v. Krieger*, 163 Wis. 2d 241, 249, 471 N.W.2d 599 (Ct. App. 1991). It is well-settled that a guilty plea must be knowingly, voluntarily and intelligently entered, *see Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Bangert*, 131 Wis. 2d at 257; a manifest injustice occurs when the plea is entered involuntarily, as Warren asserts here. *See, e.g., State v. James*, 176 Wis. 2d 230, 237, 500 N.W.2d 347 (Ct. App. 1993).

¶34 In this case, we need not delve into the record to determine whether the circuit court followed the necessary procedures, since it is well-established that in informing defendants of their rights, courts are only required to notify them of the "direct consequences" of their pleas. *Brady v. United States*, 397 U.S. 742, 755 (1970). Defendants do not have a due process right to be informed of consequences that are merely collateral to their pleas. *See State v. Santos*, 136 Wis. 2d 528, 531, 401 N.W.2d 856 (Ct. App. 1987); *State v. Madison*, 120 Wis. 2d 150, 159-161, 353 N.W.2d 835 (Ct. App. 1984). Therefore, we must determine whether the requirement that Warren would have to admit his guilt during offense-specific probationary treatment is a direct or collateral consequence of his *Alford* plea.

¶35 "The distinction between direct and collateral consequences of a plea . . . turns on whether the result represents a definite, immediate, and largely automatic effect on the range of the defendant's punishment." *James*, 176 Wis. 2d at 238 (citations and internal quotation marks omitted). When the challenged consequence of the plea does not "automatically flow" from the conviction, but rather will depend upon the defendant's psychological

condition at a future proceeding, the consequence is collateral. *See State v. Myers*, 199 Wis. 2d 391, 394, 544 N.W.2d 609 (Ct. App. 1996).

¶36 In *Myers*, the court of appeals held that the potential for a future Wis. Stat. ch. 980 sexual predator commitment following a sexual assault conviction was a collateral consequence which need not be part of a plea colloquy in order to make a defendant's guilty plea knowing and voluntary. *See id.* at 394-95. Although chapter 980 commitments require future trials and submission of evidence, *see id.*, the same reasoning applies here.

¶37 Warren's probation would not have been revoked had he admitted his guilt at the probationary treatment programs he attended during his five years on probation. Stated differently, the consequence of probation revocation for failure to admit guilt during sex offender counseling is not direct and immediate, or even "inevitable" as Warren asserts. It will instead depend upon defendants' willingness to admit their guilt in a rehabilitative setting – a situation which the circuit court, even if it is aware of all the consequences attendant to the commission of a sexual offense such as this one, could not be expected to anticipate or predict.[13]

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[13] We note the following statement by the circuit court at the post-conviction motion hearing on November 14, 1996: "The Court did not tell Mr. Warren specifically that if he didn't admit guilt, he would fail his counseling and be revoked. Quite frankly, the Court didn't tell him that because the Court didn't necessarily know that, but in any event, I think I warned him that he would have to go through counseling." Record on Appeal, No. 97-0851 at 68:27 (Motion Hrg. Nov. 14, 1996).

¶38 In *James*, the court of appeals held that resentencing upon revocation of one's probation is only a collateral consequence to a no contest plea. *See James*, 176 Wis. 2d at 243-44. Because the consequence of the defendant's plea was "contingent on his own behavior," it was "neither a definite, immediate, nor largely automatic consequence of his plea but only a collateral consequence of which the trial court was not bound to inform him." *Id.* at 244.

¶39 In the same way, Warren's probation revocation for failure to admit his guilt in treatment was: (1) not definite, since some defendants who are unwilling to admit their guilt at the plea stage might conceivably be amenable to treatment at the rehabilitation stage; (2) not immediate, either in time or in impact, since the revocation was contingent upon intervening circumstances; and (3) not automatic, since the ability to abide by the conditions of probation was well within Warren's control.[14]

¶40 Therefore, we conclude that the circuit court was not required to inform Warren that his probation could be revoked for failing to take responsibility for his actions because it was only a collateral consequence of his conviction. Our conclusion is further supported by policy considerations.

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[14] Warren argues that *James* is of no comfort to the State's argument because unlike the defendant in *James*, Warren's behavior after conviction did not change – he continued to maintain his innocence as he had always done. Warren's argument is based upon the same faulty premise we rejected in Case No. 96-2441: that an *Alford* plea gives a defendant the right to maintain his innocence after conviction.

¶41 As the facts of this case make clear, not all conditions of probation are imposed at the time the guilty plea is entered.[15] To require the circuit courts to determine and inform the defendant of the current policies of the Department of Corrections every time a plea is entered would be both unreasonable and impractical. A circuit court's plea colloquy cannot reasonably be expected to encompass all treatment and conditions of probation which the defendant might need in the future. The Department of Corrections must be given latitude to assess the particular needs of a given defendant, as he or she proceeds through the term of probation. By doing so, the Department of Corrections may best serve the twin goals of probation: rehabilitation and safety to the community. *See Carrizales*, 191 Wis. 2d at 95-96.

¶42 Warren cites four cases from foreign jurisdictions to support the proposition that the State cannot revoke a defendant's probation for failing to admit guilt in treatment when he or she was not informed of this requirement at the time of the *Alford* plea. *See People v. Birdsong*, 937 P.2d 877 (Colo. Ct. App. 1996); *Diaz v. State*, 629 So. 2d 261 (Fla. Dist. Ct. App. 1993); *State v. Jones*, 926 P.2d 1318 (Idaho Ct. App. 1996); *People v. Walters*, 627 N.Y.S.2d 289 (Cty. Ct. 1995). We are not persuaded by the foreign authority upon which Warren relies.

¶43 We begin by noting that the decision by the Colorado Court of Appeals has recently been reversed. *See People v. Birdsong*, No. 96SC828, 1998 WL 251473

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[15] The record shows that the Department of Corrections amended Warren's probation rules at least 13 times during his five year period of probation.

(Colo. May 18, 1998). In that case, the defendant, *Birdsong*, entered an *Alford* plea to third degree sexual assault in exchange for dismissal of other felony sexual assault counts. *See id.* at *1. The trial court accepted his plea, and imposed a four-year sentence of probation conditioned upon Birdsong's successful completion of offense-specific therapy. *See id.* at *1-*2. By the time that Birdsong entered his plea, he had already attended approximately one year of sex offender treatment, *see id.*, and thus had actual knowledge of the requirements of the sex offender program. *See id.* at *9 (Scott, J., concurring).

¶44 When Birdsong failed to admit his guilt during subsequent therapy sessions, the trial court revoked his probation. *See id.* at *2. Upon review of this decision, the court of appeals reversed the probation revocation; the court concluded that acceptance of an *Alford* plea was directly inconsistent with a finding that refusal to admit guilt constituted a probation violation. *See id.* at *3.

¶45 The Supreme Court of Colorado reversed, relying in part on the court of appeals' decision in this case. *See id.* at *6-*7 ("We find [the *Warren* court's] reasoning to be wholly consistent with that expressed by the Supreme Court in Alford."). Although the case is not directly on point,[16] the *Birdsong* court shares our view of an *Alford*

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[16] The most distinguishing characteristic of the *Birdsong* decision is that the defendant in that case had, as we have indicated, actual knowledge of the particular requirements of the sex offender treatment program he was obliged to complete. *See People v. Birdsong*, No. 96SC828, 1998 WL 251473, at *2, *9 (Scott, J., concurring) (Colo. May 18, 1998).

plea's significance. The court rejected Birdsong's argument that the plea was deficient because the trial court failed to advise him that he would have to admit guilt in order to complete treatment, and stated:

> [w]e view the case differently from the court of appeals. An Alford plea is a guilty plea. As such, the trial court's obligations to advise the defendant were no greater than with any other guilty plea. . . .
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> . . . [T]he specific requirements of a treatment program and the harmony between those requirements and the defendant's perception of his guilt does not fall within the aegis of the trial court's necessary advisement to the defendant.

Id. at *3, *4.

¶46 The Colorado Supreme Court further explained that the trial court did not have to inform the defendant that his probation might be revoked for failing to admit his guilt because it was not a direct consequence of the *Alford* plea:

> Here, the possibility that Birdsong's probation would be revoked if he continued to maintain innocence as to his motives for the inappropriate contact with his daughter is not a direct consequence. Viewed from the perspective of the time of the providency hearing, revocation would certainly not be automatic, for an individual might be willing to admit to something in a therapeutic setting but not in a court of law. Additionally, we do not expect a trial court to maintain working familiarity with all requirements of certain types of treatment programs so

> as to be able to advise defendants with particularity about those requirements before accepting pleas that involve probation. That responsibiiity falls to the defendant and his or her counsel.

Id. at *5. This reasoning is clearly applicable to the facts of this case.

¶47 The remaining decisions upon which Warren relies are largely inapposite. *Diaz* is of little assistance to our present inquiry because the defendant pled guilty in that case. Moreover, the primary defect in the revocation of the defendant's probation was the trial court's failure to make counseling a condition of probation. *See Diaz*, 629 So. 2d at 261-62. Neither *Jones* nor *Walters* involve a knowing and voluntary plea analysis which distinguishes between direct and collateral consequences of an *Alford* plea. *See generally Jones*, 926 P.2d 1318; *Walters*, 627 N.Y.S.2d 289.

¶48 In sum, we conclude that Warren's entry of an *Alford* plea in this case was not rendered unknowing and involuntary by the circuit court's failure to inform him that he would be required to admit his guilt during probationary treatment. We now proceed to address Warren's argument that the State breached its plea agreement by revoking his probation.

BREACH OF PLEA AGREEMENT

¶49 Warren next argues that the State breached the *Alford* plea agreement and thereby violated his right to due process when it revoked his probation solely on his continued assertion of innocence. In this case, Warren

concedes that the facts relating to the terms of the plea agreement and the prosecutor's actions after sentencing are not in dispute. Therefore, this is a question of law which we review de novo, without deference to the conclusions of the circuit court. *See State v. Wills*, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995); *State v. Ferguson*, 166 Wis. 2d 317, 320-21, 479 N.W.2d 241 (Ct. App. 1991).

¶50 The plea stage of a criminal prosecution, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello v. New York, 404 U.S. 257, 262 (1971). This concept is grounded in a defendant's constitutional right to due process. *See State v. Castillo*, 205 Wis. 2d 599, 607, 556 N.W.2d 425 (Ct. App. 1996), *review dismissed as improvidently granted*, 213 Wis. 2d 488, 570 N.W.2d 44 (1997); *State v. Bond*, 139 Wis. 2d 179, 188, 407 N.W.2d 277 (Ct. App. 1987).

¶51 The party seeking to vacate a plea agreement must establish by clear and convincing evidence that a "material and substantial" breach of the agreement has occurred. *Bangert*, 131 Wis. 2d at 289; *State v. Jorgensen*, 137 Wis. 2d 163, 168, 404 N.W.2d 66 (Ct. App. 1987). We are satisfied that Warren has not met this burden here.

¶52 The record is devoid of any suggestion that Warren was promised by the circuit court or the State that

he should not have to admit his guilt during probationary treatment. As the court of appeals noted in Case No. 96-2441:

> the only comments by the court in this regard informed Warren that his not having to "admit . . . anything in court" did *not* affect his obligation to enter in good faith into the counseling that would likely be imposed as a condition of confinement. And it is undisputed that that probation agent consistently expressed to Warren that he did have to admit responsibility for the assault in order to successfully complete the counseling that was a condition of his probation.

Warren, 211 Wis. 2d at 718-19.

¶53 Warren argues that following the entry of his plea, he did nothing that would justify the State's "change of position" with regard to its promise of a non-custodial sentence: he simply continued to assert his innocence as he had always done. In doing so, he cites two cases for the proposition that the State must adhere to promised sentence recommendations after the original sentence proceeding. *See Castillo*, 205 Wis. 2d 599; *State v. Windom*, 169 Wis. 2d 341, 485 N.W.2d 832 (Ct. App. 1992).

¶54 We need not examine these cases in detail, because once again, Warren's argument is based upon the faulty premise that an *Alford* plea is a promise that a defendant will never have to admit his guilt. Because an *Alford* plea is not infused with any special promises, the State did not "change its position" when it revoked his probation for failing to admit guilt during probationary treatment.

¶55 Because the State never promised or assured Warren that he would be able to maintain his innocence for purposes other than the plea itself, we conclude that the State did not breach its *Alford* plea agreement with Warren when it revoked his probation in this case.

"STRONG PROOF OF GUILT"

¶56 "Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind." *Alford*, 400 U.S. at 32. The situation changes, however, when the defendant enters an *Alford* plea as Warren has done here. *See id.* at 37; 2 David Rossman, *Criminal Law Advocacy* ¶ 4.02 (1995). To accept an *Alford* plea in Wisconsin, the circuit court must determine that the summary of the evidence the state would offer at trial constitutes "strong proof of guilt." *See Garcia*, 192 Wis. 2d at 859-60; *Johnson*, 105 Wis. 2d at 663. *See also Alford*, 400 U.S. at 37.[17] Because the determination of the existence of a sufficient factual basis lies within the discretion of the

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[17] "The requirement of a higher level of proof in *Alford* pleas is necessitated by the fact that the evidence has to be strong enough to overcome a defendant's 'protestations' of innocence." *State v. Smith*, 202 Wis. 2d 21, 27, 549 N.W.2d 232 (1996). As we noted in *Garcia*, the requirement of "strong proof of guilt," together with the procedural safeguards afforded by Wis. Stat. § 971.08 and applicable review if the statute is not followed, "are sufficient to assure that an *Alford* plea is entered in a constitutionally acceptable manner." *Garcia*, 192 Wis. 2d at 859-60.

circuit court, we will not overturn that determination unless it is clearly erroneous. *See Smith*, 202 Wis. 2d at 25.

¶57 "Strong proof of guilt" is not the equivalent of proof beyond a reasonable doubt, but it is "clearly greater than what is needed to meet the factual basis requirement under a guilty plea." *Smith*, 202 Wis. 2d at 27; *Spears*, 147 Wis. 2d at 435. The *Johnson* court provided more insight into what constitutes a sufficient factual basis to accept an *Alford* plea. *See Johnson*, 105 Wis. 2d at 664. In that case, the court of appeals examined the record to determine whether a "sufficient factual basis was established at the plea proceeding to substantially negate [the] defendant's claim of innocence." *Id.* We agree with this standard, and proceed to apply it to the facts of this case; we do so noting that in the context of a negotiated guilty plea, as here, a court "need not go to the same length to determine whether the facts would sustain the charge as it would when there is no negotiated plea." *Smith*, 202 Wis. 2d at 25 (quoting *Broadie v. State*, 68 Wis. 2d 420, 423-24, 228 N.W.2d 687 (1975)).

¶58 In this case, the circuit court was satisfied that the testimony given at the preliminary hearing constituted strong proof of guilt. We agree, and in large part let the victim's testimony and that of Officer Cupp speak for itself. The evidence reproduced above provides a sufficient factual basis to substantially negate Warren's protestations of innocence. Nevertheless, Warren draws our attention to three specific testimonial defects which allegedly illustrate that the evidence did not show strong proof of guilt. We examine these arguments in turn.

¶59 First, Warren argues that J.K. was unable to provide testimony regarding the sexual assault which occurred on October 2, 1989 the charge for which the *Alford* plea was entered. We disagree. A fair reading of the information in this case illustrates that the State accused Warren of sexual assault on more than one occasion for the charge to which Warren pled. *See* Record on Appeal, No. 97-0851 at 11:1, 65:2-3 (Information April 30, 1990; Plea Hrg. July 10, 1990). As the above-reproduced testimony of the victim reveals, J.K. testified explicitly about the events which occurred on one of those occasions: May 27, 1989.

¶60 Second, Warren asserts that J.K.'s testimony was contradicted by Cupp's testimony; J.K. testified that the assault on May 27, 1989, occurred in the afternoon, in the living room and on a couch, while Cupp testified that the same incident was supposed to have occurred in the morning, in the bedroom and on a bed. We reject this argument.

¶61 Officer Cupp's hearsay testimony regarding the specific time and location of the May 27, 1989, assault does not command the conclusion that the victim's testimony establishes something less than strong proof of guilt. The circuit court's conclusion in this regard was not clearly erroneous.

¶62 Finally, Warren argues that because J.K. physically referenced her "entire upper chest area" at the preliminary hearing, and testified that Warren touched her "crotch" – areas that are not specifically included in the definitions of "sexual contact" or "intimate parts" under

Wis. Stat. § 939.22(19) – her testimony does not establish strong proof of guilt.

¶63 Not only is this a strained interpretation of the facts, but it would be absurd to require a ten-year old child to testify with the same language that the state legislature has chosen for our statutes. We have little trouble concluding that J.K.'s explicit testimony was sufficient to fall within the statutory definitions necessary for a sexual assault conviction. Accordingly, we conclude that the circuit court did not erroneously exercise its discretion in finding strong proof of Warren's guilt so as to justify acceptance of his *Alford* plea.

APPOINTMENT OF COUNSEL

¶64 In his final argument to this court, Warren asserts that he was denied his due process right to appointment of counsel for the post-conviction proceedings in this case. This presents a question of constitutional fact which we review de novo, without deference to the conclusion of the circuit court. *See State v. Dean*, 163 Wis. 2d 503, 511, 471 N.W.2d 310 (Ct. App. 1991).[18]

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[18] In this case, the circuit court found Warren indigent and referred him to the State Public Defender's Office (SPD) for appointment of counsel pursuant to Wis. Stat. § 974.06(3)(b). The SPD declined to appear on behalf of Warren pursuant to its discretionary authority to do so. *See* Wis. Stat. § 977.05(4)(j). The circuit court also declined, in its discretion pursuant to *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991), to appoint counsel. Warren does not challenge the circuit court's discretionary decision to decline to appoint counsel; he argues instead that he has a constitutional right to appointed counsel in this case.

¶65 It is well established that an indigent defendant has a constitutional right to appointed counsel on his or her first direct appeal of right from a conviction. *See Douglas v. California*, 372 U.S. 353, 357-58 (1963). The due process clause, however, does not require appointment of counsel for discretionary appeals. *See generally Wainwright v. Torna*, 455 U.S. 586 (1982); *Ross v. Moffitt*, 417 U.S. 600 (1974). Thus, as the United States Supreme Court has stated, "the right to appointed counsel extends to the first appeal of right, and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

¶66 Warren's motion for post-conviction relief pursuant to Wis. Stat. § 974.06 is not a direct appeal from a conviction. Rather, a § 974.06 proceeding is considered to be civil in nature, and authorizes a collateral attack on a defendant's conviction. *See* § 974.06(6).[19] Defendants do

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[19] Wisconsin Stat. § 974.06 provides in relevant part:

974.06 Postconviction procedure. (1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

. . . .

not have a constitutional right to counsel when mounting collateral attacks upon their convictions, such as the § 974.06 postconviction motion involved here. *See Finley*, 481 U.S. at 555; *Johnson v. Avery*, 393 U.S. 483, 488 (1969). Therefore, Warren did not have a right to appointed counsel at his § 974.06 postconviction proceedings.

¶67 The appellate courts do retain the discretion to appoint counsel to an indigent defendant upon appeal from the denial of a Wis. Stat. § 974.06 motion, *see Peterson v. State*, 54 Wis. 2d 370, 381-82, 195 N.W.2d 837 (1972); *State v. Alston*, 92 Wis. 2d 893, 895, 288 N.W.2d 866 (Ct. App. 1979), but we decline to exercise such discretion in this case by imposing the cost of this litigation on the State Public Defender.

¶68 Warren argues that because the State did not revoke his probation until well after the time limits for filing a direct appeal had expired, he was "deprived . . . of his constitutional right to test the validity of his criminal conviction on direct appeal with the assistance of court appointed counsel." Warren Brief, No. 97-0851 at 39. Therefore, Warren asks this court to conclude that he has a due process right to appointed counsel to pursue

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(6) Proceedings under this section shall be considered civil in nature, and the burden of proof shall be on the person.

As we noted in *Peterson v. State*, 54 Wis. 2d 370, 381, 195 N.W.2d 837 (1972), "the [§ 974.06] motion was authorized as a substantial replacement for the petition for habeas corpus in this court. Matters which usually were presented by petition for habeas corpus to this court now are covered by the sec. 974.06 postconviction motion to the trial court."

his claims in postconviction proceedings under Wis. Stat. § 974.06. We are not persuaded by Warren's argument.

¶69 We begin analyzing this argument from our stated premise that a defendant does not have a constitutional right to appointed counsel in a Wis. Stat. § 974.06 postconviction proceeding. *See Finley*, 481 U.S. at 555. Warren attempts to circumvent this principle by bootstrapping his collateral postconviction motion to a direct appeal from his conviction for sexual assault – a right of appeal he was allegedly "prevented" from exercising.

¶70 From the outset, this argument is troubling because Warren explicitly waived his rights to a direct appeal. *See* Record on Appeal, No. 97-0851 at 65:7 (Plea Hrg. July 10, 1990). More importantly, pursuant to Warren's theory, the due process clause would guarantee court-appointed counsel in a postconviction proceeding every time a defendant's probation was revoked after the time for filing a direct appeal had expired. We decline to stretch the due process clause to such lengths. Therefore, we hold that Warren does not have a due process right to appointed counsel in this case.[20]

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[20] Warren relies upon *Piper v. Popp*, 167 Wis. 2d 633, 482 N.W.2d 353 (1992), for his request that we apply to this case the presumption in favor of appointed counsel in civil actions where the indigent defendant may be deprived of physical liberty. *Piper* is inapplicable to the facts of this case; the issue in *Piper* was whether due process requires the appointment of counsel to represent an indigent prisoner in defending a civil tort action. *See id.* at 644. The analysis employed by *Piper* does not apply to defendants who seek appointed counsel in Wis. Stat. § 974.06 postconviction proceedings.

¶71 In sum, we conclude that Warren's right to due process was not violated when the State revoked his probation for failing to admit his guilt during probationary treatment; that Warren's plea was knowingly and voluntarily entered; that the State did not breach its plea agreement with Warren; that there was "strong proof of guilt" sufficient to justify the circuit court's acceptance of his *Alford* plea; and that Warren did not have a due process right to appointment of counsel in his postconviction proceedings. Accordingly, the decision of the court of appeals in Case No. 96-2441, and the order of the circuit court in No. 97-0851 are affirmed.

¶72 We pause to once again call for heightened diligence on the part of circuit courts in accepting *Alford* pleas – particularly in cases involving sex offenses. The acceptance of *Alford* pleas is entirely discretionary,[21] and

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[21] Defendants do not have a constitutional right to enter a guilty plea. As the *Alford* court stated:

> Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . although the States may by statute or otherwise confer such a right. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence.

North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970). Wisconsin law also reflects this principle. *See Garcia*, 192 Wis. 2d at 856 ("the circuit courts of Wisconsin may, *in their discretion*, accept *Alford* pleas") (emphasis added); Wis. Stat. § 971.06(1)(c) (criminal defendant may plead no contest "subject to the approval of the court"). *See also generally* Wis JI – Criminal

circuit courts should apply a critical eye toward accepting such pleas. An inherent conflict arises when a charged sex offender enters an *Alford* plea: the offender cannot maintain innocence under the *Alford* plea and successfully complete the sex offender treatment program, which requires the offender to admit guilt.

¶73 One recent article stresses the problems inherent with accepting *Alford* pleas by sex offenders. *See* Kim English, et al., *Managing Adult Sex Offenders in the Community – A Containment Approach* at 7 (Nat'l Inst. Justice January 1997). The authors advocate consistent public policies to advance the public safety priority of sex offender management. *See id.* "Particularly important is the development of policies that prohibit pleas or dispositions that reinforce sex offenders' frequent refusal to admit their crimes, to acknowledge the seriousness of their actions, or to take responsibility for the harm they have caused." *Id.*

¶74 Two examples of such pleas: *Alford* and no contest pleas. *See id.* The authors' point is entirely relevant to this case: "Such pleas grant sex offenders official justification to continue denying their offending behavior after conviction." *Id.* Given the accepted premise that admission of guilt is a necessary "first step towards rehabilitation" of sex offenders, *Carrizales*, 191 Wis. 2d at 95, the circuit courts would be wise to avoid these problems in the first place. *See* Alice J. Hinshaw, Comment, *State v. Cameron: Making the Alford Plea an Effective Tool in Sex*

SM-32A (1995) (illustrating that the circuit courts have discretion whether to accept a no contest or *Alford* plea).

Offense Cases, 55 Mont. L. Rev. 281, 297 (1994) ("Prohibition of the Alford plea in sex offense cases offers the simplest solution to the Alford plea conflict. Removing the Alford plea simply eliminates the threat of appeals based on the defendant's confusion or misunderstanding concerning the consequences of the plea.").

¶75 Should the circuit courts in their discretion decide to accept *Alford* pleas in such cases, we strongly advise them to give *Alford*-pleading defendants an instruction at the time of the plea that their protestations of innocence extend only to the plea itself, and do not serve as a guarantee that they cannot subsequently be punished for violating the terms of their probation which require an admission of guilt. Because of the unique nature of *Alford* pleas, circuit courts accepting such pleas should take extra care to ensure that defendants understand that in order to successfully complete the treatment program, they will be required to admit guilt. Such instructions will avert any misconceptions by defendants that the *Alford* plea provides any "promises" or "guarantees" of what is constitutionally appropriate probationary treatment.

By the Court. – The decision of the court of appeals in Case No. 96-2441 is affirmed. The order of the circuit court in Case No. 97-0851 is affirmed.

APPENDIX B

COURT OF APPEALS DECISION DATED AND RELEASED

May 15, 1997

No. 96-2441

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN EX REL. PHILLIP I. WARREN,

PETITIONER-APPELLANT,

v.

DAVID H. SCHWARZ, IN HIS CAPACITY AS ADMINISTRATOR, DEPARTMENT OF ADMINISTRATION, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

(Filed May 15, 1997)

APPEAL from an order of the circuit court for Richland County: KENT C. HOUCK, Judge. *Affirmed.*

Before Eich, C.J., and Vergeront and Deininger, JJ.

VERGERONT, J. Phillip Warren filed a petition for writ of certiorari to review the decision of the Department of Administration, Division of Hearings and Appeals (division) revoking his probation. His probation was revoked because he failed to successfully complete a sexual offender treatment program in that he failed to acknowledge responsibility for the sexual assault for which he was convicted. The trial court affirmed the

decision of the division. Warren appeals, contending that it is a violation of his right to due process to revoke his probation because of his denial of guilt for a sexual assault when the conviction for that assault is based on an *Alford* no contest plea. He also contends that the State did not adequately explore suitable alternatives to revocation. We conclude that Warren's right to due process was not violated and that the division properly exercised its discretion in concluding that there were no alternatives to revocation. We therefore affirm.

BACKGROUND

Warren was convicted of first-degree sexual assault of a child in July 1990, following the entry and acceptance of an *Alford* no-contest plea. The victim was the daughter of Warren's girlfriend. Before the trial court accepted the plea and after advising and questioning Warren on other matters, the court advised Warren that, in the event the court granted probation, counseling would likely be a condition. The court continued, "and that carries with it – I realize that you, by making your plea of no contest, are not admitting anything in court, but you still would have an obligation to enter into counseling in good faith with the counselor, the psychiatrist, or doctor, whoever, so that's something you should realize." The court then asked Warren if he had any questions given all the things the court had told him about the effect of his plea, and Warren answered "no." Before accepting Warren's plea, the court also found strong evidence of actual guilt based on the testimony at the preliminary hearing.

The trial court imposed a five-year sentence which it stayed in favor of an eight-year term of probation. One of the court-ordered conditions of probation was that Warren cooperate with any counseling as ordered by the Department of Corrections (DOC) and complete any counseling as ordered. DOC imposed other conditions, including rules governing his contact with minor children, and more specific rules regarding counseling, which will be discussed in more detail later in the opinion.

DOC issued a notice of violation on or about September 28, 1995, alleging that Warren had violated a condition of probation by failing to successfully complete Attic's Denial Focus Sex Offender Treatment Program in violation of Rule #15f of the Rules of Probation signed on April 3, 1995. That rule provided: "You shall enter and successfully complete the sex offender treatment groups at an approved inpatient treatment program, attend weekly, and abide by the rules of contract, by April 20, 1995."

After a hearing, the hearing examiner for the division ordered that Warren's probation be revoked.[1] In his decision, the hearing examiner made the following findings. The court accepted Warren's ***Alford*** plea and determined

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[1] If a probationer violates the conditions of probation, DOC may initiate a proceeding before the Division of Hearings and Appeals in the Department of Administration. Section 973.10(2), STATS. The hearing takes place unless waived by the probationer, and the hearing examiner enters an order either revoking or not revoking probation. ***Id.*** Either DOC or the probationer may request review of that order by the administrator of the division. ***Id.***

there was strong evidence of Warren's guilt. The court also advised Warren that if he were placed on probation, he would be expected to enter into good faith counseling as part of his probation term. Warren adequately reported to his probation agent, paid all court-ordered financial obligations, and maintained stable employment and a stable residence. Warren attended three separate group sessions of Attic's treatment program, the first beginning in March 1991. He attended every meeting and participated in discussions. He repeatedly denied any culpability for the conviction, denied he had committed any sexual offense, and portrayed himself as a victim of the criminal justice system. He was repeatedly warned by his agent that he must successfully participate in the sex offender treatment program or risk revocation. His rules were amended numerous times to impress upon him the seriousness of the treatment requirement.

In his decision, the examiner also discussed Warren's position that DOC lacked the authority to require him to successfully complete the treatment program because he pleaded no contest and maintained his innocence. The examiner noted that Warren was a convicted sex offender, had been ordered to cooperate in good faith in counseling and to complete any counseling ordered and that treatment was consistently emphasized by his agent as a key aspect of his supervision. The examiner stated that Warren's failure to admit his guilt as part of treatment effectively hindered the probation agent's ability to ensure public safety and Warren's rehabilitation. The examiner found that Warren had a moderate to moderately high risk of reoffending within the community because of his failure to take responsibility for his actions that led to the

sexual assault conviction. Revocation was therefore necessary both to protect the public and to provide a confined correctional treatment setting for Warren. The examiner concluded that alternatives to revocation within the community were not viable and feasible because of Warren's failure to successfully complete the community-based treatment.

The examiner's decision was affirmed by the division administrator. On appeal by writ of certiorari, the trial court affirmed. It concluded that the requirement that Warren successfully complete sexual offender treatment was a reasonable requirement necessary for the protection of the public and for Warren's rehabilitation and served a legitimate penological objective. The court rejected Warren's argument that his right to due process was violated because he was required to admit his guilt in order to successfully complete the treatment program.

DISCUSSION

Due Process

We review the division's decision, not that of the trial court. A court's review by certiorari of a tribunal's decision is limited to four inquiries: (1) whether the tribunal stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the evidence that it did. ***Van Ermen v. D.H.S.S.***, 84 Wis.2d 57, 63, 267 N.W.2d 17, 20 (1978). The first issue Warren raises on appeal – whether his revocation for failure to acknowledge responsibility

for the sexual assault violates his right to due process – involves the second inquiry and presents a question of law, which we review de novo. *See* ***State v. Carrizales,*** 191 Wis.2d 85, 92, 528 N.W.2d 29, 31 (Ct. App. 1995).

Warren's due process argument is based on the nature of the ***Alford*** plea. An ***Alford*** plea is a plea in which the defendant pleads either guilty or no contest, while either maintaining his innocence or not admitting having committed the crime. *See* ***State v. Garcia,*** 192 Wis.2d 845, 856, 532 N.W.2d 111, 115 (1995); *see also* ***State v. Salentine,*** 206 Wis.2d 418, 423-25, 557 N.W.2d 439, 441-42 (Ct. App. 1996). Our supreme court has recognized that an ***Alford*** plea is a legally permitted form of a plea, which a court may in its discretion accept when the court determines there is strong evidence of actual guilt and the plea is knowing, voluntary and intelligent. ***Garcia,*** 192 Wis.2d at 859-60, 532 N.W.2d at 116-17.[2] A defendant has no constitutional right to the acceptance of an ***Alford*** plea. ***North Carolina v. Alford,*** 400 U.S. 25, 39 n.12 (1970).

Warren contends that when a court accepts an ***Alford*** plea, it "countenances the process of the defendant maintaining his or her innocence while still being convicted

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[2] ***Alford*** pleas are treated differently than other pleas in that for the latter the court must establish a sufficient factual basis that the defendant committed the crime to which he is pleading, while for ***Alford*** pleas a higher level of proof – a showing of strong proof of guilt – is required. ***State v. Smith,*** 202 Wis.2d 21, 27, 549 N.W.2d 232, 234-35 (1996). "The requirement of a higher level of proof is necessitated by the fact that the evidence has to be strong enough to overcome a defendant's protestations of innocence." ***Id.*** at 27, 549 N.W.2d at 235.

and punished" and this carries with it an "implicit assurance" that the defendant will not be punished for asserting his or her innocence. According to Warren, this assurance is violated when probation is revoked for failing to admit commission of the crime in the context of a treatment program required as a condition of probation. The State responds that *Carrizales* has resolved this issue against Warren.

In *Carrizales,* the defendant pleaded no contest to a sexual assault charge. The trial court accepted the plea, withheld sentence, and placed him on probation for three years. As a condition of probation, the court ordered Carrizales to receive any counseling deemed appropriate by the probation agent. *Carrizales,* 191 Wis.2d at 91-92, 528 N.W.2d at 30. When Carrizales was terminated from the sexual offender treatment program because he refused to admit the sexual assault, he sought a temporary injunction against revocation of his probation, which the trial court treated as a motion to modify the terms of probation. *Id.* at 92, 528 N.W.2d at 31. The issue before us on appeal was whether the requirement that Carrizales admit his guilt in the context of a treatment program that was a condition of his probation violated his Fifth Amendment right against self-incrimination. *Id.* at 92, 528 N.W.2d at 31. We concluded that it did not, because Carrizales had already been convicted of the crime and there was no threat that the admission would be used in a separate criminal proceeding. We also concluded that the requirement that the probationer admit responsibility for the assault in order to successfully complete the program was an appropriate condition of probation because it met the twin goals of rehabilitation and protection of the

community: the persons providing the treatment viewed it as a necessary and the first step toward rehabilitation, and untreated sex offenders pose a risk in the community. *Id.* at 95-96, 528 N.W.2d at 32.

Carrizales does establish that the trial court may properly impose counseling as a condition of probation after a conviction for a sexual assault. *Carrizales,* 191 Wis.2d at 93, 528 N.W.2d at 31. It also establishes that a requirement that the probationer admit responsibility for the sexual assault in the context of a required treatment program is within DOC's statutorily-granted authority to supervise a probationer under conditions set by the court and rules and regulations set by DOC. *See id.* at 95-96; 528 N.W.2d at 32; *see also* § 973.10(1), STATS. However, although we held in *Carrizales* that this requirement did not violate a probationer's Fifth Amendment right against self-incrimination, we did not there address the contention on this appeal – that the otherwise valid requirement violates a probationer's right of due process because of the court's acceptance of an *Alford* plea. We do not agree with the State that *Carrizales* resolves this issue, but we decide the issue against Warren for the reasons we explain below.

The premise of Warren's due process argument is that the acceptance of an *Alford* plea implies an assurance that the defendant will not have to admit his guilt either during conviction or punishment. This premise is faulty. An *Alford* plea does not imply a promise or assurance of anything. More accurately stated, an *Alford* plea, if accepted by the court, permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence. There is nothing inherent in

the nature of an ***Alford*** plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction. Warren provides no authority for this proposition, and we find nothing in the cases discussing the nature and validity of ***Alford*** pleas that suggests this is the case.

We do not understand Warren to argue that the trial court or the prosecutor actually gave assurances to Warren that he would not have to admit guilt "during punishment." Indeed the record shows that the only comments by the court in this regard informed Warren that his not having to "admit . . . anything in court" did *not* affect his obligation to enter in good faith into the counseling that would likely be imposed as a condition of confinement. And it is undisputed that the probation agent consistently expressed to Warren that he did have to admit responsibility for the assault in order to successfully complete the counseling that was a condition of his probation.

Warren argues that the due process principle applicable in this case is the same as that applied in ***Raley v. Ohio,*** 360 U.S. 423 (1959), and requires reversal of the revocation decision. In ***Raley,*** a member of a commission established by the state legislature both expressly and implicitly assured persons being questioned by the commission that they had a state constitutional privilege not to incriminate themselves. After declining to answer and claiming that privilege, those persons were prosecuted for failing to answer because a state statute denied immunity to persons testifying before legislative committees. ***Id.*** at 424-26. The Supreme Court concluded that the convictions for failure to answer the questions violated

the due process clause of the Fourteenth Amendment because they were "the most indefensible sort of entrapment by the state – convicting a citizen for exercising a privilege which the state has clearly told him is available to him." *Id.* at 438. Warren contends that probation revocation is a punishment for asserting his innocence and is the same form of "state-created entrapment" as that held constitutionally impermissible in *Raley*.

We do not agree with Warren that the facts in this case constitute "state entrapment" of the type described in *Raley*. It was critical to the Court's decision in *Raley* that the commission had actively misled the defendants into not answering questions by assurances that they had a privilege to do so, although the Court did not find that this misleading was intentional. *Id.* at 437-39. As we have already discussed, there is no legal basis for implying, solely from the acceptance of an *Alford* plea, an assurance that Warren would not be sanctioned if he failed to take responsibility for the sexual assault in the context of the counseling required as a condition of his probation, and there were no express assurances given him.

Warren also finds support for his argument in *Carrizales*. First, he points to our statement that "if probation is revoked and Carrizales is sentenced, the trial court may not base its sentence exclusively upon Carrizales's refusal to admit guilt." *Carrizales*, 191 Wis.2d at 96, 528 N.W.2d at 32. This statement was based on case law establishing that it is a violation of a defendant's right against self-incrimination to subject him to greater penalties at sentencing for having exercised his right against self-incrimination, but it is not a violation of that right to take the defendant's attitude toward the crime into

account as one among a number of factors relevant to sentencing. *See State v. Baldwin,* 101 Wis.2d 441, 456-59, 304 N.W.2d 742, 750-52 (1981). We do not see what relevance this has to Warren, since he has already been sentenced, and he expressly states that his argument is premised on the due process clause, not the Fifth Amendment right not to incriminate one's self.

Second, Warren points to the dissent in *Carrizales.* The dissent concluded that the expulsion from the treatment program because Carrizales would not admit his guilt was a new factor which frustrated the counseling condition of probation and requiring the court to "resentence" Carrizales (although the court had withheld a sentence when it imposed probation). *Carrizales,* 191 Wis.2d at 100-01, 528 N.W.2d at 32-33 (Sundby, J., dissenting). Again, we do not see how this analysis supports the result Warren seeks. He has already been sentenced, and he is not asking the court to resentence him; instead he seeks to reverse the probation revocation.

We conclude that the trial court's acceptance of Warren's *Alford* plea does not limit the requirements DOC may otherwise lawfully impose on Warren, and that Warren's right to due process was therefore not violated by requiring that he admit responsibility for the sexual assault in the context of a treatment program required as a condition of probation.[3]

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[3] We recognize that Warren may be contending that he would not have entered an *Alford* plea had he understood he might have to or would have to admit guilt in the context of the court-ordered counseling that was a condition of his probation. However, that contention is not a challenge to the correctness of

Alternatives to Revocation

Warren's second challenge to the probation revocation is that the division had an obligation to establish, before revoking parole, that there was no reasonable alternative to revocation, which includes a duty to investigate the availability of potential treatment alternatives, and that it did not do so. This challenge implicates the third and fourth areas of a court's certiorari review – whether the division's decision was arbitrary, unreasonable and capricious, representing its will, not its judgment, and whether it is supported by the evidence. We begin by defining more precisely the duty of the division and our scope of review.

An agency's decision is not arbitrary and capricious and represents its judgment if it represents a proper exercise of discretion. ***Von Arx v. Schwarz,*** 185 Wis.2d 645, 656, 517 N.W.2d 540, 544 (Ct. App. 1994). In ***Plotkin v. DHSS,*** 63 Wis.2d 535, 217 N.W.2d 641 (1974), the court held that these ABA guidelines "properly set forth the duty of . . . [an] administrative body in exercising its discretion in regard to the possibility of probation revocation:

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the decision to revoke his probation. Rather, it goes to whether his plea was knowing, voluntary and intelligent. We note that Warren has filed a motion for postconviction relief arguing that his ***Alford*** plea was not knowingly and intelligently entered because he was not informed that he would have to admit his guilt if he was given a term of probation. *See* ***State v. Warren,*** Case No. 96-3451-CRLV. Our decision on this appeal does not address that argument. We decide only that the revocation of Warren's probation for failure to admit his guilt after acceptance of his ***Alford*** plea did not violate his right to due process.

5.1 Grounds for and alternatives to probation revocation.

(a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

(b) It would be appropriate for standards to be formulated as a guide to probation departments and courts in processing the violation of conditions. In any event, the following intermediate steps should be considered in every case as possible alternatives to revocation:

(i) a review of the conditions, followed by changes where necessary or desirable;

(ii) a formal or informal conference with the probationer to re-emphasize the necessity of compliance with the conditions;

(iii) a formal or informal warning that further violations could result in revocation." American Bar Association, *Standards Relating to Probation*, pp. 15, 16, 56, 57.

Id. at 544-45, 217 N.W.2d at 645-46.

In a later case, ***Van Ermen***, 84 Wis.2d 57, 267 N.W.2d 17 (1978), the court considered the argument that the ***Plotkin*** standards required that the Department of Health and Social Services consider alternatives to revocation and stated:[4]

> This does not mean that revocation cannot occur unless alternatives are tried, but it does mean that the Department must exercise its discretion by at least considering whether alternatives are available and feasible.

Id. at 67, 267 N.W.2d at 21-22. We consider this to be the proper formulation of the State's duty with respect to alternatives to probation revocation.

Although DOC has the burden of proving the alleged probation violation by a preponderance of the evidence at the revocation hearing, on appeal challenging the division's decision to revoke, the probationer has the burden of proving the decision was arbitrary and capricious, that is, that the division did not properly exercise its discretion. ***Von Arx***, 185 Wis.2d at 655, 517 N.W.2d at 544. A proper exercise of discretion contemplates a reasoning process based on the facts of record and a conclusion based on a logical explanation founded upon a proper legal standard. ***Id.*** at 656, 517 N.W.2d at 544. We may not substitute our judgment for that of the division; we inquire only whether substantial evidence supports its

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[4] Although ***Van Ermen*** was a certiorari review of a parole revocation, it discussed and applied the ***Plotkin*** standards because the Department of Health and Social Services had relied on them in ordering parole revocation. ***Van Ermen***, 84 Wis.2d at 65-67, 267 N.W.2d at 21-22.

decision. If it does, we must affirm even though there is evidence that may support a contrary determination. *Id.* Substantial evidence is evidence that is relevant, credible, probative and of a quantum upon which a reasonable fact-finder could base a conclusion. *Id.*

The record before the hearing officer in this case consisted of evaluations and reports on Warren's treatment needs from the beginning of his probation until just before the notice of violation. These show that the first time he participated in the Attic twelve-week denial focus sex offender treatment group in 1991, he attended but consistently denied that he had assaulted his former girlfriend's daughter, stating that she had "made this all up to be a class hero." The therapist considered him a high risk of reoffending. Warren entered the program a second time in the following year, and at the program's completion, the therapist reported that he again participated only with great reluctance and continued to deny the offense. The therapist stated that he posed a threat to the community, and that he was not a candidate for further treatment "due to his extreme denial stance."

On February 22, 1995, a specific rule was added to Warren's conditions of probation[5] that required Warren "to enroll in a sex offender treatment group that is of your choice with the approval of your agent and you shall successfully complete all recommended treatment." That rule was reaffirmed on April 3, 1995, and a rule was added at that time that Warren participate in a sex

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[5] From the beginning of Warren's probation, one condition was, "You shall make every effort to accept the opportunities and counseling offered by supervision."

offender evaluation to include a psychological evaluation and follow through with the recommendations made. In April 1995, Warren went to a psychologist of his own choosing because he questioned his need to be supervised in his contact with the minor son of his current girlfriend and his need for sex offender treatment. That psychological evaluation concluded that Warren needed to participate and successfully complete a denial focused, sex offender treatment group followed by long term sex offender treatment and that, should he refuse to participate or successfully complete either program, he remained at a much higher risk in the community for reoffense because of his untreated status. The evaluation also recommended that he should be restricted in his contact with children until his treatment status progressed. The record indicates that Warren claimed he stopped seeing this psychologist because she did not give him a favorable recommendation.

Warren was allowed to participate in the Attic program a third time, in the summer of 1995. At the program's completion, the therapist reported that Warren continued to deny his involvement in the offense, portrayed himself as a caring parental figure, a victim of the judicial system, attacked the character of the child and her mother, and blamed his various problems on his abusive and immoral female partners. The therapist concluded that Warren was not an acceptable candidate for the treatment program. Relapse factors showed a high risk of reoffending.

The record contains evidence that throughout Warren's probation he continually requested permission to have contact with children and attempted to circumvent

the restrictions regarding his contact with children on a number of occasions.

The revocation report, also part of the record, stated that alternatives to revocation were considered and rejected because Warren was not amenable to treatment and that the Division of Intensive Sanctions[6] was considered but rejected because Warren is a sex offender. The report concluded that Warren was in need of treatment and that treatment within an institution appeared to be the only option because the community-based treatment programs were not able to break through his denial.

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[6] Section 301.048, STATS., provides in part:

> **Intensive sanctions program.** (1) PROGRAM ADMINISTRATION AND DESIGN. The department shall administer an intensive sanctions program. The department shall design the program to provide all of the following:
>
> (a) Punishment that is less costly than ordinary imprisonment and more restrictive than ordinary probation or parole supervision.
>
> (b) Component phases that are intensive and highly structured.
>
> (c) A series of component phases for each participant that is based on public safety considerations and the participant's needs for punishment and treatment.
>
> (2) ELIGIBILITY. A person enters the intensive sanctions program only if he or she has been convicted of a felony and only under . . . the following circumstances:
>
> . . . .
>
> (d) The department and the person agree to his or her participation in the program as an alternative to revocation of probation or parole.

We conclude that the division properly exercised its discretion in revoking Warren's probation, and, in particular, discharged its duty to consider whether alternatives to revocation were available and feasible. Warren does not dispute that he refused to admit responsibility for the offense and does not contend that he did not understand that such an admission was considered essential to the successful completion of the treatment required as a condition of his probation. There is substantial evidence to support the division's conclusion that in the absence of such an admission, Warren was at a high risk of reoffending. The division did consider whether there were alternatives to revocation in response to the violation. Its conclusion that there were none is a reasonable one and is supported by substantial evidence in the record.

Warren argues that the fact that he twice previously completed the Attic program without admitting his responsibility but was not revoked then shows that revocation was not necessary. We disagree with this conclusion. We think this shows that DOC took intermediate steps before deciding on revocation, as directed by ***Plotkin***. Warren was allowed to repeat the program three times in an effort to see if his participation would improve, and he was allowed to see a psychologist of his choosing to determine whether the requirements placed on him were necessary. With this history, it was reasonable for the division to conclude that Warren's denial stance was not going to change and that he was not amenable to the necessary treatment.

Warren appears to argue that DOC or the division had a duty to investigate and permit Warren to try treatment programs that did not require an admission of guilt,

referring to *Von Arx*. *Von Arx* does not impose such a duty. In *Von Arx*, the probationer challenged revocation for failure to meet the sexual offender treatment conditions of his probation on the ground that the state had failed to reasonably accommodate his religious beliefs. *Von Arx* claimed the state had a duty to enroll him in treatment programs that did not offend his religious beliefs. *Von Arx*, 185 Wis.2d at 649, 517 N.W.2d at 542. We assumed for purposes of argument that the duty to consider feasible alternatives involves the obligation to reasonably accommodate a probationer's religious beliefs. *Id.* at 656, 517 N.W.2d at 545. We concluded that the State made a reasonable effort to find a suitable sexual offender treatment program that did not offend the probationer's views, including giving the probationer the opportunity to offer a scientifically-approved treatment program that did not offend his views. *Id.* at 657-58, 517 N.W.2d at 545.

Warren's challenge to the requirement that he admit responsibility for the offense is not based on a religious belief. Therefore, any duty the State may have to reasonably accommodate religious beliefs by finding suitable sex offender treatment programs to accommodate those beliefs is not relevant to Warren's revocation.

Warren also argues that revocation was improper because he was subject to numerous rules during the course of his probation, many of them changing over time, and his failure to admit his guilt was the only violation. This argument ignores the fact that the crime for which Warren was convicted and sentenced to probation was sexual assault of a child. It was reasonable for the division to consider the rules relating to his treatment

as a sex offender to be of such significance that his failure to successfully complete that treatment justified revocation in spite of his compliance with other rules.

By the Court. – Order affirmed.

Recommended for publication in the official reports.

APPENDIX C

SUPREME COURT
OF WISCONSIN
OFFICE OF THE CLERK
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MARILYN L. GRAVES
CLERK

Date: August 27, 1998

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The court has entered the following order:

Case No. **97-0851**
State v. Philip Warren
Trial Court Case No. 90 CF 10

The court having considered the Motion for Reconsideration filed in the above matter, **IT IS ORDERED** that the Motion for Reconsideration is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court